

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES RODRIGUEZ,

Defendant and Appellant.

G039831

(Super. Ct. No. 07WF0361)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Lauren E. Eskenazi, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

Defendant's contends the court abused its discretion when it revoked and terminated his probation. He also claims prejudice because the court imposed the high term without ordering the preparation of a probation report. We affirm.

I

FACTS

Defendant Andres Rodriguez was charged with violation of Penal Code sections 666, 484, subdivision (a) and 488. (Unless otherwise specified, all further statutory references are to the Penal Code.) He pleaded guilty on February 26, 2007, offering the following facts as the basis for his plea: "In Orange County, California, on 10/29/06 I took personal property from another, 7-11, without consent and with the intent to permanently deprive. I have previously been convicted of a theft related crime and sentenced to jail (case no[s]. 98WM01647, 99NM10255, 99WM02544, and 00WF2322)." Defendant waived a probation report and requested immediate sentencing. The court suspended imposition of sentence and placed him on three years formal probation with one of the terms being he spend 60 days in jail. Another term and condition was that defendant must obey all laws.

On April 9, 2007, a notice of probation violation was filed. It stated: "According to the records of the Garden Grove Police Department (DR#07-05898), on April 5, 2007, the probationer was arrested for criminal conspiracy, transport/sell manufacture, and possess marijuana under 28.5 grams." The recommendation from the probation officer was: "In view of the foregoing, i[t] is respectfully recommended the probationer be found in violation of probation, that probation be revoked and reinstated under the prior terms with the additional condition he be ordered to serve 180 days in the Orange County [j]ail." The trial court revoked probation.

Defendant and a codefendant in the drug case were tried before a jury for sale of methamphetamine. The codefendant was found guilty of "sale or transportation of a controlled substance." But the jury was unable to reach a unanimous verdict with

regard to defendant and told the court it was split with 10 jurors favoring a guilty verdict and two favoring a not guilty verdict, and the court declared a mistrial.

The evidence educed during defendant's mistrial included the testimony of Richard Burillo, a detective with the Garden Grove Police Department, working in an undercover capacity in the narcotics unit. On April 5, 2007, Burillo was looking around an area where two people had just been arrested for selling narcotics, when defendant whistled and waved at him. Burillo walked toward defendant, and defendant asked him what he wanted. Burillo said, "Can I get a 20?" Defendant asked the detective what he wanted for \$20, and Burillo said he asked for "crystal," which he explained is street slang for crystal methamphetamine.

Defendant then spoke with the codefendant. The codefendant rode his bicycle toward Burillo and told Burillo he did not have anything with him, but that he could get it in about five minutes. Burillo told him he would wait. A short time later, the codefendant returned and handed Burillo a black plastic baggie containing "a crystal-like substance resembling crystal methamphetamine" in exchange for \$20.

Later, the court found defendant in violation of the terms of his probation. The court explained its reasons for imposing the sentence it did: "And the defendant does have numerous prior convictions and they are of increasing seriousness and the court finds that there are no mitigating factors so the court does select the aggravated term of three years and the defendant is so sentenced to the three years."

II

DISCUSSION

Probation revocation

Section 1203.2 subdivision (a) provides: "At any time during the probationary period of a person released on probation under the care of a probation officer pursuant to this chapter, . . . if any probation officer or peace officer has probable cause to believe that the probationer is violating any term or condition of his or her

probation or conditional sentence, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate such probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses”

“As the language of section 1203.2 would suggest, the determination whether to grant or revoke probation is largely discretionary. [Citations.] The correct standard of proof to be used by the trial court in assessing whether there exists ‘reason to believe’ the probationer has violated his probation or committed a new offense has been variously stated [citations]. Yet the authorities are unanimous in concluding that the standard of proof used in a criminal trial, namely the ‘beyond a reasonable doubt’ standard [citation] is inapplicable to the probation revocation hearing. [Citations.] Accordingly, probation may be revoked despite the fact that the evidence of the probationer’s guilt may be insufficient to convict him of the new offense. [Citations.]” (*In re Coughlin* (1976) 16 Cal.3d 52, 56.) “The standard of proof in probation revocation proceedings is proof by a preponderance of the evidence. [Citation.]” (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.)

“Upon any revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced. However, if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that the judgment shall be in full force and effect. In either case,

the person shall be delivered over to the proper officer to serve his or her sentence, less any credits herein provided for.” (§ 1203.2, subd. (c).)

“Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.” (§ 666.)

Here defendant admitted he had previously been convicted of theft and served time in jail. Additionally, the evidence preponderates defendant violated his probation when he aided and abetted his codefendant in the sale of narcotics. Accordingly, the trial court did not err in revoking and terminating his probation.

Probation report

Defendant claims the matter should be remanded and he should be resentenced because the trial court did not obtain a probation report prior to imposing sentence upon him. “[I]f a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment.” (§ 1203, subd. (b)(1).)

We note defendant waived his right to a probation report when he was initially sentenced on the underlying crime. At that time, the court suspended imposition of sentence. After his probation was revoked and terminated, the court asked if “anybody need[s] to be heard any further.” No probation report was requested, so it was reasonable

for the trial court to assume defendant continued to waive his right to have a probation report prepared prior to sentencing.

A court's error in sentencing without a probation report does not implicate a federal constitutional right, only California statutory law, so *People v. Watson* (1956) 46 Cal.2d 818, 836, applies. Under *Watson*, reversal is mandated when "there is a reasonable probability of a result more favorable to defendant if not for the error." (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 182.)

Here defendant argues he was prejudiced because "the trial court did not consider the complaint or any other documents outside of the evidence introduced at trial when deciding whether aggravating circumstances existed in [defendant's] case." He also argues "there is no evidence to support the trial court's finding that [defendant's] prior convictions were numerous and increasing in seriousness."

In the record about his prior crimes, the facts offered in defendant's plea agreement are: "I have previously been convicted of a theft related crime and sentenced to jail (case no[s]. 98WM01647, 99NM10255, 99WM02544, and 00WF2322)." From that sparse information, we take judicial notice of the records of the Orange County Superior Court. (Evid. Code § 452.) We are able to determine from the case numbers that in 1998 and 1999 defendant was convicted of misdemeanors in the West Justice Center, in 1999, he was convicted of a misdemeanor in the North Justice Center and in 2000 he was convicted of a crime in the West Justice Center that was charged as a felony. Thus, with considering his present crime of aiding and abetting the sale of narcotics only for purposes of his probation violation, we are able to find substantial evidence in the record from which the trial court was able to determine defendant's crimes are both numerous and of increasing seriousness. Accordingly, we conclude there is substantial evidence in the record to support the trial courts reasons for selecting defendant's sentence, and that defendant was not prejudiced because the court did not order a

probation report. If there was any error in not obtaining a probation report prior to sentencing, it is harmless.

Upper term

“When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court’s discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected” (§ 1170, subd. (b).) The court in *People v. Black* (2007) 41 Cal.4th 799, 818, held the defendant, with three prior misdemeanor convictions, was eligible for the upper term because his convictions were both numerous and of increasing seriousness.

Here defendant admitted he committed the instant theft, plus three previous thefts. As the trial court noted, his crimes are numerous and increasing in seriousness. Thus, in basing the sentence on defendant’s criminal record, the trial court engaged in none of the judicial factfinding prohibited under *Cunningham v. California* (2007) 549 U.S. 270, 274-275. A defendant does not have a right to a jury trial for a sentence based on the fact of a prior conviction. (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 246.) Under these circumstances, we cannot conclude the trial court erred in imposing an aggravated sentence.

III
DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.